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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. [redacted] 175

JOSEPH COLOMBO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TO THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOSEPH COLOMBO, hereby petitions for a Writ of Certiorari to review the order of the Court of Appeals of the State of New York entered in this proceeding on October 30, 1969, which affirmed the order and judgment of the Appellate Division, Second Judicial Department reversing the Judgement of the Supreme Court, Kings County.

OPINIONS BELOW

The memoranda of the Court of Appeals, appears as Appendix D hereto, and is reported in 25 N.Y. 2d 641, 306 N.Y.S.2d 258. The opinion of the Appellate Division, Kings County, reported in 32 A.D.2d 812, 302 N.Y.S.2d 488 appears herein as Appendix E.

The opinion of the Supreme Court, Kings County, printed as Appendix F hereto, is not yet reported.

JURISDICTION

The judgement and order of the Court of Appeals termed remittitur was entered on October 30, 1969. (See Appendix A) A timely petition for rehearing was denied on February 26, 1970 (See Appendix B), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether two successive prosecutions of the petitioner arising out of the same conduct violates the constitutional guarantee against double jeopardy as provided in the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Was the petitioner's privileges and immunities violated and was he denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the failure of the District Attorney to inform the Grand Jury that petitioner was willing to appear before the Grand Jury and testify?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The following are the relevant portions:

(a) The Fifth Amendment to the Constitution of the United States

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;..."

U.S.C.A. Const. Art. 5.

(b) Article I, Section 6, of the Constitution of the State of New York

"No person shall be subject to be twice put in jeopardy for the same offense:...."

McKinney's Const. Art. 1 Sec. 6.

STATUTES

The following are the relevant portions:

(c) Section 600 of the former Penal Law of the State of New York provides:

Criminal Contempt

"A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor:...(Subdivision 6) Contumacious and

unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

(d) Section 601 of the former Penal Law of the State of New York provides:

Punishment for Criminal Contempt

"A criminal act is not the less punishable to a crime, because it is also declared to be punishable as a contempt of court."

(e) Section 602 of the former Penal Law of the State of New York provides:

Indictment for Contempt

"Punishment for a contempt, as prescribed in Article nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

(f) Section 750 Judiciary Law of the State of New York provides:

"A court of record has power to punish for criminal contempt, a person guilty of any of the following acts..."

"5. Contumacious and unlawful refusal...after being sworn, to answer any legal and proper interrogatory."

(g) Section 755 of the Judiciary Law of the State of New York provides:

When punishment may be summary: Where the offense is committed in the immediate view and presence of the court...upon a trial or hearing, it may be punished summarily..."

STATEMENT OF THE CASE

The petitioner Joseph Colombo had been subpoenaed to appear before the Grand Jury of the County of Kings on July 14, 1966. The petitioner informed the District Attorney that he wished to appear and testify before the Grand Jury. He was excused and never called before this Grand Jury (63-64).[1]

Petitioner Joseph Colombo was thereafter indicted on or about November 10, 1966, charging him with criminal contempt of court in violation of Penal Law Sec. 600, Subd. 6, for his alleged "contumacious and unlawful refusal, after being duly sworn, as a witness, to answer to legal and proper interrogatories" (5, 166).

The District Attorney conceded that this Indictment against the petitioner was based solely on petitioner's original refusal on December 7, 1965 to answer questions before the Grand Jury of the County of Kings and for which he was adjudged in criminal contempt of court on December 15, 1965, pursuant to Sec. 750 of the Judiciary Law, and for which he had served a jail sentence of 30 days and paid a fine of $250 (169). (See Appendix I)

Judge Barshay in that case in his Memorandum Opinion dated December 8, 1965, had found Joseph Colombo guilty of

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[1]The page citations are to the Record filed in this case.

criminal contempt in that Joseph Colombo "has wilfully disobeyed the lawful mandate of this Court to answer legal and proper interrogatories." This conviction was affirmed, *Matter of Koota v. Colombo,* 17 N.Y. 2d 147, 269 N.Y.S. 2d 393, 216 N.Y.2d 568, certiorari denied 384 U.S. 100. (See Appendix H)

Petitioner had offered to go before the Grand Jury on May 9, 1966 and testify after a stay of the execution of thirty days and fine of $250 had expired, but the District Attorney refused to permit him to appear before the Grand Jury and testify (168), although on October 20, 1965, the District Attorney had said, "If any witness wants to testify at any time I will be happy to have him." The court asked whether "proceedings against him will be dropped" and the District Attorney replied, "Automatically" (173-174).

The Grand Jury that returned the instant Indictment against the petitioner on October 10, 1966, although it had subpoenaed petitioner, was never notified that Joseph Colombo had appeared on July 14, 1966 and had offered to testify (63-64, 168). They were informed that petitioner was held in contempt and punished for the same act that they were indicting him for.

Petitioner filed a Motion to Dismiss the Indictment (10-12). In this motion petitioner contended that this indictment (see Appendix J) placed him in double jeopardy (10-11). He further argued that he was denied a fair hearing before the Grand Jury (11-12).

Judge Damiani in an Opinion dated July 20, 1966, dismissed the Indictment on the ground that the Grand Jury was not apprised of appellant's willingness to testify before the Grand Jury, suggesting that the District Attorney should "accept the offer of the defendants to testify and recall them

before the Grand Jury" (175). The court refused the consideration of the question of double jeopardy in view of the particular facts in this case (171). (See Appendix F)

The court stated after reviewing the Grand Jury Minutes: "It is my opinion that they failed to establish that the defendants' refusal to answer the Grand Jury's questions was contumacious and wilful. Even if it be assumed that the Minutes are sufficient on their face, in fairness to the defendants, the Indictment should be dismissed and the case resubmitted to the Grand Jury so that the Minutes of all of the proceedings before the present Presiding Justice may be submitted to it and that it may be made aware of all of the facts concerning the defendants' conduct herein" (171). This was never done by the district attorney.

The Transcript of Grand Jury Minutes dated October 10, 1966 (95-107) proves conclusively that the Grand Jury was never informed that petitioner Joseph Colombo, although subpoenaed to appear before this Grand Jury on July 14, 1966, had offered to testify. The Grand Jury was given a transcript of the original testimony of Joseph Colombo on October 14, 1965 (115-119) and an application to punish for contempt of court for refusal to testify before the Grand Jury (121-164).

An appeal was taken by the State to the Appellate Division of the Supreme Court, Second Department, from the Order Dismissing the Indictment (3).

On June 19, 1969 the Order which granted the Motion of appellant Joseph Colombo was reversed and an Opinion was filed. (See Appendix E) *People v. Colombo,* 32 A.D.2d 812, 302 N.Y.S.2d 488.

The question of fair hearing before the Grand Jury and

double jeopardy were argued before the Appellate Division. That court indicated that the fair hearing question before the Grand Jury was not germane to this case (179). With regard to double jeopardy they stated:

> "There is no merit in the claim by respondents Colombo and Albert Gallo that these indictments placed them twice in jeopardy for the same acts..."(180).[2]

On July 7, 1969 permission was granted appellant Joseph Colombo by Chief Judge Fuld to appeal to the Court of Appeals pursuant to Section 520 of the Code of Criminal Procedure.

The cause was heard by the Court of Appeals of the State of New York and Petitioner, Joseph Colombo argued that he was unfairly indicted due to the fact that the Grand Jury should have heard or been apprised of all the facts and circumstances regarding his desire to testify. He further emphasized that he was being placed in double jeopardy by being forced to be placed on trial for a crime that he was already convicted and sentenced for.

On October 30, 1969, the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, Second Department. *People v. Colombo,* 25 N.Y. 2d 641, 306 N.Y.S.2d 258 (memo opinion).(See Appendix D).

Petitioner, Joseph Colombo, made a timely motion for reargument urging upon the New York Court of Appeals that the matter of *Waller v. Florida,*——U.S.——(Dec'd April 6, 1970), 25 L.Ed. 2d 435, 38 L.W. 4263, had not been decided by this Court and requested the New York Court of

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[2]Decision as two defendants Gallo and Colombo—Gallo is not petitioning this Court.

Appeals to reconsider its original decision or at least wait until the Supreme Court of the United States decided the aforementioned *Waller* case, due to its double jeopardy ramifications. The Court denied this request, and on February 26, 1970, the Court of Appeals denied the motion for reargument and amended its remittur by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered his contention and held that there was no violation of the defendant's constitutional rights." (See Appendix A)

REASONS FOR GRANTING THE WRIT

Successive Prosecutions of the SameDefendant Arising Out of the Same Conduct Violates the Constitutional Guarantee Against Double Jeopardy.

The Fifth Amendment to the Constitution of the United States provides, in language virtually identical with that of the New York State Constitution[3]

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

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[3]Article I, Section 6, of the Constitution of the State of New York provides that:

> "No person shall be subject to be twice put in jeopardy for the same offense."

Under that provision it is plain that Section 602 of the former New York Penal Law would be unconstitutional if applied here—since it recites on its face that additional punishment for the identical act is not only proper but indeed desirable and necessary. Actually, nothing could be plainer than that this is precisely what is intended.

The Supreme Court has construed the protection as applicable to both felonies and misdemeanors. *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

In *Helvering v. Mitchell*, 303 U.S. 391, a unanimous Supreme Court, speaking through Mr. Justice Brandeis, said (pp. 397-398, 399):

> "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.
>
> * * * Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction.
>
> * * *
>
> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."

In *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed.2d 797, 89 S.Ct. 2056, decided June 16, 1969, the Supreme Court held that the Fifth Amendment guarantee is enforceable against the States through the Fourteenth Amendment, overruling *Palko v. Connecticut,* 302 U.S. 319. (1937).

Appellant here has been punished for his crime. He is not offering to repay "that which he stole",[4] but on the contrary he offered to testify again and again before a Grand Jury and to answer questions which the District Attorney stated was necessary for its investigation. However, the District Attorney it is submitted was and is more interested in punishment than information.

The scope of the guaranty against double jeopardy has been so recently and so thoroughly discussed that extended discussion is not necessary. *Waller v. Florida,* 38 L.W. 4263, *supra; Benton v. Maryland,* supra. Tested by those criteria, it is plain that the indictment in the case at bar involves double jeopardy.

First, it is plain from the very language of the statute that it contemplates both a second trial as well as additional punishment for the precise offense.

Sections 601 and 602 of the Penal Law provide as follows:

"§ 601. *Punishment for criminal contempt.*

"A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

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[4] Quoting from Respondent's Brief in the court below.

"§ 602. *Indictment for contempt.*

"Punishment for a contempt, as prescribed in Article Nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment the court, in sentencing him, must take into consideration the previous punishment."

Article 19 of the Judiciary Law is entitled "Contempts." Its first section is § 750, *Power of courts to punish for criminal contempts,* which in pertinent part provides:

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: * * *

"3. Wilful disobedience to its lawful mandate."

In the previous proceeding, *Matter of Koota v. Colombo,* 17 N.Y.2d 147, certiorari denied, 384 U.S. 1001, the present respondent was punished pursuant to § 750(A) (3) of the Judiciary Law.

Thus here the appellant would not simply be retried for the same act. He would be placed in jeopardy for the identical offense, namely, willful disobedience of the court's order to testify before the Grand Jury.

The proof in this case would be identical with the proof in the earlier case.

No independent, separate, or distinct element would be involved in the proof of the present indictment; every element

involved in the crime of contempt now alleged was similarly involved in the contempt for which the respondent was earlier tried and earlier convicted.

And trial on the present indictment for contempt would be had in the same tribunal that had earlier convicted this appellant for the identical contempt, namely, the Supreme Court of the State of New York for Kings County.

It is thus plain that the present indictment involves double jeopardy under the tests discussed and applied in *Waller v. Florida, supra; Benton v. Maryland, supra.* Petitioner submits, on the strength of these recent complete discussions that the present indictment subjects him to double jeopardy in violation of the Fifth Amendment of the Constitution of the United States.

In *Waller v. Florida, supra*, the Court considered whether the defendant could be twice placed on trial for the same alleged crime. In a majority opinion, Chief Justice Burger stated: "...Petitioner could not lawfully be tried both by the municipal government and State of Florida. In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution." (at page 4265)

In the case at bar, the petitioner was adjudged guilty of the crime of criminal contempt and sentenced by a Justice of the Supreme Court, Kings County.

Presently, the District Attorney desires to prosecute the petitioner once again for what he concedes was the same transaction and in fact, the same crime in the same Supreme Court, Kings County.

Obviously, the respondent is attempting to bring the petitioner to trial for the *same crime* and in the *same court.* The double jeopardy clause bars a second trial since all the charges grew out of the same criminal episode.

B. The Failure by the District Attorney to Inform the Grand Jury That Had Subpoenaed the Appellant to Testify That Appellant Was Willing to Appear Before the Grand Jury and Testify Violated Petitioner's Right to A Fair Hearing Before the Grand Jury.

The appellant was subpoenaed to appear before the Grand Jury on July 14, 1966 and testify. When he appeared in answer to the subpoena he was never called as a witness and the Grand Jury that indicted him was never informed that he had appeared in answer to the subpoena.[5]

Judge Damiani, in his Opinion, stated that the failure to apprise the Grand Jury of the defendant's request to testify after being subpoenaed by the Grand Jury "compels the conclusion that in fairness to the defendants that the Indictment should be dismissed and the matter resubmitted to the Grand Jury with a view to advising them of all the facts above set forth. It may well be, in view of the above circumstances, that the Grand Jury may not find that the

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[5]This case is quite different than *Matter of Louis Marangelo v. Criminal Court of the City of New York, et al.,* 49 Misc. 2d 414 aff'd 21 N. Y. 2d 967, April 10, 1968, since there the witness wilfully and contumaciously refused to testify before the Grand Jury at all times and never wished to testify after being subpoenaed and resubpoenaed as a witness.

defendants' refusal on December 7, 1965 was contumacious and unlawful within the meaning of Sec. 600, Subd. 6 of the Penal Law" (175).

In *Hoffman v. United States,* 341 U.S. 479, 485, in discussing the rights of witnesses before the Grand Jury, the Supreme Court stated: "The signal increase in such litigation emphasizes the continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power invoked, bearing in mind that while Grand Juries 'may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire . . . whether a crime cognizable by the Court has been committed,' *Hale v. Henkel,* 201 U.S. 43, 65; 50 L.Ed. 652, 661; 26 S.Ct.370 (1906), yet 'the most valuable function of the Grand Jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused' (Id. 201 U.S. at 59)."

We submit that the failure of the prosecutor to have informed the Grand Jury of appellant's willingness to testify before the Grand Jury after having been resubpoenaed by the Grand Jury to appear before that Body justifies the dismissal of the Indictment due to the fact that petitioner was denied a fair hearing before the Grand Jury that indicted him. Unquestionably, one of the due process rights of the petitioner was the right to a fair Grand Jury hearing.

Furthermore, a prosecutor should not be allowed to conceal evidence helpful to a target before a Grand Jury. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the indictment.

Respectfully submitted,

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May 1970.